LIBRARY
SUPREME COURT, U. S.

SEP 1 1970
ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970
No. 627

THRIFTIMART, INC., a corporation doing business as Smart & Final Iris Co., GILBERT P. STEWART, WILLIAM TODD, SR., and ROBERT D. JENSEN, individuals,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

WILLIAM J. CURRER, JR.,
548 South Spring Street,
Suite 939,
Los Angeles, Calif. 90013,
(213) 628-9152,
Counsel for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 685-9790

SUBJECT INDEX

Page

I.

Opinions Below 2

II.

Jurisdiction 2

III.

Questions Presented 3

IV.

The Statutes and Regulations Requiring Interpretation by This Court 4

V.

Statement 5

VI.

Reasons for Granting the Writ 11

A. The Judgments Below Reject the Doctrine of the United States Supreme Court 11

B. The Opinion Below Unreasonably and Unfairly Discriminates Against Businesses and People Employed in Businesses 12

C. There Is a Conflict Among Courts of Appeals 13

D. 21 U.S.C. 374(a) Is Unconstitutional by Camara and See Standards 14

E. The Discretion of the Food and Drug Administration 14

F. The Issues Are Important Questions of Law. 15

VII.

Conclusion 15

INDEX TO APPENDICES

Appendix A. Order Denying Defendants' Motion to Suppress 1

Appendix B. Judgments 2

Appendix C. Judgment 8

Appendix D. On Petition for Rehearing 16

Appendix E. Pertinent Sections Involved 17

TABLE OF AUTHORITIES CITED

Cases	Page
Bumper v. North Carolina, 88 S. Ct. 1788 (June 3, 1968)	12, 14
Camara v. Municipal Court, 387 U.S. 523, 87 S. Ct. 1727 (1967)	3, 4, 8, 11, 12, 13, 14, 15
Cipres v. United States, 343 F. 2d 95 (CCA 9, 1965)	12
Frank v. Maryland, 359 U.S. 360, 79 S. Ct. 804 (1959)	11, 12, 13
Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966)	8
Schoepflin and Smith v. United States, 391 F. 2d 398 (CCA 9, 1968)	12
See v. Seattle, 387 U.S. 541, 87 S. Ct. 1737 (1967)	3, 4, 8, 11, 12, 13, 14, 15
United States v. J. B. Kramer Grocery Co., Inc., 294 F. Supp. 65 (USDC Ark. 1969), aff'd 418 F. 2d 987 (CCA 9, 1969)	13, 14
United States v. Stanack Sales Co., 387 F. 2d 849 (CCA 3, 1968)	4, 14

Statutes	
United States Code, Title 21, Sec. 331(f)	4, 5
United States Code, Title 21, Sec. 331(f)	4
United States Code, Title 21, Sec. 331(k)	4
United States Code, Title 21, Sec. 332	4
United States Code, Title 21, Sec. 333	4, 5
United States Code, Title 21, Sec. 334	4
United States Code, Title 21, Sec. 336	3, 4, 14
United States Code, Title 21, Sec. 342	4

Page

United States Code, Title 21, Sec. 342(a)(3) ...3, 5, 10, 11

United States Code, Title 21, Sec. 342(a)(4) ...3, 5, 10, 11

United States Code, Title 21, Sec. 346 ...4, 5

United States Code, Title 21, Sec. 372 ...4, 9

United States Code, Title 21, Sec. 373 ...4, 9, 10

United States Code, Title 21, Sec. 374(a) ...3, 4, 7, 14

United States Code, Title 21, Sec. 374(b) ... 4

United States Code, Title 21, Sec. 374(c) ... 4

United States Code, Title 21, Sec. 374(d) ... 4

United States Code, Title 28, Sec. 1254(1) ... 2

United States Constitution, Fourth Amendment ...3, 5, 11, 12

United States Constitution, Fifth Amendment ...3, 5

IN THE

Supreme Court of the United States

October Term, 1970
No. .....

THRIFTIMART, INC., a corporation doing business as Smart & Final Iris Co., GILBERT P. STEWART, WILLIAM TODD, SR., and ROBERT D. JENSEN, individuals,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The Petition of Thriftimart, Inc., a corporation doing business as Smart & Final Iris Co., Gilbert P. Stewart, (named as Gil P. Stewart in the information), William Todd, Sr., and Robert E. Jensen, individuals, for Writ of Certiorari directed to the United States Court of Appeals for the Ninth Circuit to review the Judgment of that Court entered in this case July 7, 1970 (see description below), and a Judgment denying Petition for Rehearing entered August 3, 1970, respectfully shows:

I.
Opinions Below.

In the District Court before trial and in accordance with the rules, petitioners moved the Court to suppress the service obtained by the Government in this case by warrantless searches and seizures of the four warehouses here involved and the company's books and records. The District Court denied the motion by order signed and filed May 29, 1968, a copy of which is attached hereto as Appendix A [Transcript of Record Clerk's portion (hereafter "T"), page 162]. Thereafter, on trial, objections were made to the introduction of all evidence obtained by warrantless search and seizure, but the objections were overruled by the Court and judgment entered against petitioners [T 375, 376, 377, 378]. The said judgments are attached hereto as Appendix B. Motion for new trial in the trial court was denied by order signed and filed July 29, 1968. On appeal judgment of the Court of Appeals for the Ninth Circuit (not yet reported) was made and entered July 7, 1970. A copy of the judgment of the Court of Appeals for the Ninth Circuit is attached hereto and marked Appendix C. Judgment denying petition for rehearing (not yet reported) was made and entered August 3, 1970. A copy of the said judgment denying Petition for Rehearing is attached hereto as Appendix D.

II.
Jurisdiction.

The Judgment of the Court of Appeals was entered July 7, 1970. (Appendix C) and Order Denying Petition for Rehearing was entered August 3, 1970, (Appendix D). The jurisdiction of this Court is invoked under 28 USC 1254(1).

III.

Questions Presented.

1. Whether evidence procured by inspectors of the Food and Drug Administration in a warrantless search and seizure should on motion be suppressed and at trial rejected on objection where defendants did not consent to the search and seizure nor did defendants waive their constitutional rights under the Fourth Amendment to be free from warrantless searches and seizures.

2. Whether the Notice of Inspection provisions of 21 U.S.C. 374(a) as interpreted and enforced by the Food and Drug Administration comply with the constitutional limitations on administrative searches and seizures set forth in *See v. Seattle*, 387 U.S. 541, 87 S. Ct. 1737 (1967) and *Camara v. Municipal Court*, 387 U.S. 523, 87 S. Ct. 1727 (1967).

3. Whether a corporation and its employees and officers engaged in a lawful business, have the same constitutional rights under the Fourth and Fifth Amendments as a murderer, drug peddler, drug addict, burglar, robber, or gambler.

4. Can there be a prosecution under 21 U.S.C. § 342(a)(3) or (4) where no standards have been prescribed by the Food and Drug Administration and no reason is shown for the failure of the Food and Drug Administration to exercise its discretion under 21 U.S.C. § 336.

IV.

The Statutes and Regulations Requiring Interpretation by This Court.

This case requires the interpretation of 21 U.S.C. §§ 374(a), 331(f), 331(k), 332, 333, 334, 336, 342, 346, 372, 373 and 374(b), (c) and (d). These sections are set out *haec verba* in the attached Appendix E.

21 U.S.C. §§ 331(f), 333 and 374(a), (b), (c) and (d) have essentially the same force and effect as the city ordinances found unconstitutional in *See v. City of Seattle*, 387 U.S. 541, 87 S. Ct. 1737 (1967) and *Camara v. Municipal Court*, 387 U.S. 523, 87 S. Ct. 1727 (1967). The notice requirements of Section 374 are a mere formality to be prepared by the inspector in the field and handed by him to the manager or agent in charge of the warehouse and immediately followed without any lapse of time by the commencement of the inspection. A refusal to permit inspection on any ground is a criminal offense to be punished as provided in Section 333(f). See *United States v. Stanack Sales Co.*, 387 F. 2d 849 (CCA 3, 1968). It is to be observed that it is now claimed by the Food & Drug Administration that instructions have been given to inspectors for the administration that upon a refusal to permit inspection, a warrant must be obtained without an accompanying prosecution. This instruction followed by a good many months the last inspection involved in this case. Certainly in 1968 the Government was still claiming that Stanack Sales Co. should be convicted of a crime for having refused. There is no Supreme Court case determining this matter other than *Camara* and *See*, *supra*.

The Food & Drug Administration claims that Section 336 gives it an absolute right based solely upon a subjective determination and without any standards to determine whether or not there should be a prosecution under Sections 331(f), 333 and 342(a)(3) and (4). This claim is made in spite of the fact that even for deleterious and poisonous substances standards and regulations are required (21 U.S.C. §346).

The FDA also interprets Section 342(a)(3) and (4) to include harmless insects which cannot be completely eradicated and which have no affect upon health at all. In fact in the case at bar, the FDA and Government took the position that health was completely irrelevant even to the issue of "insanitary conditions".

This case also involves an interpretation of the Fourth and Fifth Amendments and their applicability to a warrantless search, together with the proof necessary to show a consent to waive these constitutional provisions.

The Fourth and Fifth Amendments must be interpreted to determine whether the protection of these constitutional provisions apply to businessmen, business enterprises and their officers and employees.

V.

Statement.

In this petition the Transcript of Record Volume I consisting of Information, Motion to Suppress and other papers and pleadings will be referred to as "T". The Reporter's Transcript will be referred to as "R".

Smart & Final has been in business in the Southern California area, as wholesale grocers, for many years.

It operates warehouses from which it sells on a cash-and-carry basis to small retailers, restaurants, and institutional buyers only. [T 23, 24.] Each of these warehouses is operated by a manager and, depending upon its size, has thousands of items and thousands of packages of merchandise in its warehouse. In the case of the San Bernardino unit, managed by defendant Todd, the number of items for sale amounted to some 9,200. The number of food items amounted to approximately 3,100. There were approximately 75,000 packages of food included among these items, and there were approximately 20,000 packages susceptible to infestation by insects and other pests. [T 32, 41, 43, 44.] Defendant Jensen has been an employee of Smart & Final, Iris Co. for approximately seven (7) years and has been managing a unit for some four (4) years. [T 31.] Defendant Stewart is the supervisor or manager of the Cash-and-Carry Department. [T 23, 25, 37.]

In 1967, inspectors of the FDA went to the warehouses of Smart & Final located at Glendale, Pasadena, Riverside and San Bernardino. When they went to the stores, they identifed themselves by showing their badge, ascertained the name of the manager or person apparently in charge, filled in a form "Notice of Inspection", handed it to the person in charge, inquired if they could inspect and on receiving an "all right" or similar words of acquiescence to authority, proceeded immediately back into the stacks and commenced inspecting. [T 90-105, 106-116, 117-121, 29-32, 40-51, 23-27.]

Each Notice of Inspection was on a form provided by the FDA, was addressed to the manager by name and Smart & Final, it was completely general in terms

and specified that Notice of Inspection was given ". . . pursuant to section 704(a) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 374(a)] and/or Section 11(b) of the Federal Hazardous Substances Labeling Act [15 U.S.C. 1271]." It quoted the words of 21 U.S.C. 374(a) set out in Appendix E. [T. 91, 101, 109, 113.]

In every instance, the inspector walked in without giving any warning that he was trying to obtain evidence of crime against any defendant, and without any statement concerning the constitutional rights of the defendants, whether corporate or individual. In every instance the inspector demanded the right to inspect by the authority of his badge and the printed statute requiring that a warehouse manager permit inspections. Thus the inspectors gained entrance by putting the defendants in fear of criminal prosecution. At the time of the inspections, the FDA and the inspectors had no advance information that insanitary conditions existed and the Government conceded for this case that it did not contend that insanitary conditions involving health of humans were present. [T 90-121.]

The inspectors took samples, pictures, and labels. This criminal prosecution is based solely on the inspections made by the inspectors, the samples taken at the time of the inspection; the labels taken by the inspectors at the time and the photographs taken. The inspector at Glendale took a few pieces from a burlap bag which were for laboratory analysis. [T 33, 34, 42.]

The affidavits in opposition to the motion to suppress clearly show an instrusion without warrant or probable cause, an unreasonable intrusion without warning of any kind and the fact that the inspection was under

the control of the inspector in the field even to the preparation of the Notice of Inspection. [T 90.]

In no instance is there any indication that there was an understanding waiver or consent to the warrantless intrusion with knowledge that there was a right to freely and effectively refuse admission without warrant. On the contrary, the defendants believed they were compelled by law to permit the unconstitutional intrusion.

At the motion to suppress the Government admitted:

1. The Government admitted that the searches and seizures made in this case were made without warrant. [Government's brief, T 75, lines 20-32; T 80, lines 1-81, line 3; Affidavit of Philip Sheeler, T 91, lines 1-4; T 91, line 31-92, line 2; Affidavit of Robert E. Edrington, T 106, lines 14-20, T 107, lines 13-19; Affidavit of Mr. Spivak, *supra.*]

2. The Government's inspectors engaged in no warning procedures as required by *Miranda*, and they engaged in no warning or warrant procedures, such as required by *See* and *Camara*. [See references above. *See v. Seattle*, 387 U.S. 431, 87 S.Ct. 1737 (1967); *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727 (1967); and *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).]

3. The only defense to the motion asserted by the Government was that Smart & Final, Stewart, Todd and Jensen permitted or acquiesced in the intrusion. [Plaintiff's Brief in Opposition to Motion, T 75, 76, 80, 81.]

4. No effort was made by the Government to show that the words used by those purporting to give con-

sent or permission reflected an (1) understanding, (2) uncoerced, and (3) unequivocal election to grant the inspectors a license which (4) the person uttering the words knew might be freely and effectively withheld. [T 90-131.]

In denying the motion to suppress, the District Court made no finding of fact on any of these matters concerning consent or waiver. [T 162.]

At the hearing on motion to suppress, the Government admitted that if the motion were granted, virtually all of the Government's evidence would have been included. [T 80, lines 4-11.]

With respect to Messrs. Jensen and Todd, Mr. Edrington obtained a confession without any of the *Miranda* formalities. [Exhibits 2 and 6, T 110, 114.]

At trial, Smart & Final, Stewart, Todd and Jensen renewed their motion to suppress. [p. 4.] This included an oral motion based upon 21 U.S.C., Section 374, and the proposition that either Section 374 is unconstitutional or the administration of the section is unconstitutional. The record shows that although a Notice of Inspection was given, no subpena or summons was served which would have permitted defendants to place a neutral magistrate between defendants and the Government. This arose by reason of the fact that the Notice was given and the inspector immediately went in to inspect. [R. 5-9.] At the very beginning of the trial, the Government admitted that when it requested of Smart & Final and Stewart documentary evidence as provided in 21 U.S.C., Section 373, the Government made no indication that it was investigating under 21 U.S.C., Section 372, instead of 21 U.S.C., Section

373. And Section 373 provides that if the Government obtains documentary information from the defendants with respect to interstate movement, the information cannot be used in a subsequent criminal trial. [R. 9-11.]

At trial the inspectors testified that they went into each warehouse, observed the manager or employee in charge, went up to the employee—manager, identified himself as an inspector of the Food & Drug Administration, asked the man his name, and title, filled in the Notice of Inspection, handed the Notice of Inspection to the employee—manager, asked if he might inspect, and the employee-manager said "Go ahead", "Okay" or "All right". In each instance, the inspector was there on official business and demanded his right to inspect by virtue of his authority as inspector.

In founding a prosecution on the definition of adulteration in 21 U.S.C., Sections 342(a)(3) and (a)(4) the FDA uses no standard for the determination of "filth" or "insanitary" conditions. Whether the violation is one which is "minor" and for that reason not subject to prosecution is purely a subjective determination of a nameless, faceless administrator in Washington.

The Government claims that health is totally irrelevant to the question of whether or not the conditions found were "unsanitary" or "insanitary." Thus, Mr. Frank, the public prosecutor, objected to a question put to Mr. Spivak, the supervisory inspector, as to whether or not the condition the Government claimed insanitary affected health and stated:

> "Mr. Frank: Your Honor, I object. Health is not an issue in this case. It is just irrelevant." [R. 822, lines 5-7.]

Mr. Spivak also testified:

"By Mr. Currer:

Q. In other words, your idea of insanitary does not include the necessity of it having to do with health, is that right?

A. No." [R. 882, lines 20-24.]

There is no standard set by the FDA with respect to 21 U.S.C. 342(a)(3) and (4) whereby the FDA may say "This man has violated the standard. Therefore, prosecution will be recommended." [R. 887.]

Of the 93 inspections of the 26 warehouses of Smart & Final over the period of January 1, 1963, to May, 1968, 36 inspections revealed products that were contaminated with insects, rodents or birds. [R. 892, 893.] Only one prosecution involving four warehouses was ever filed and that is the case that is before the Court.

VI.

Reasons for Granting the Writ.

Certiorari should be granted in this case for the following reasons:

A. The Judgments Below Reject the Doctrine of the United States Supreme Court.

By its opinion the Court of Appeals for the Ninth Circuit has rejected and refused to follow the doctrine of this Court in *Camara, supra*, where this Court expressly overruled *Frank v. Maryland*, 359 U.S. 360, 79 S. Ct. 804 (1959) and expressly held that intrusions for inspection purposes were protected by the Fourth Amendment. *See, supra*, applied this doctrine to business and commercial establishments and in effect fur-

ther overruled *Frank v. Maryland, supra.* The opinion below (Appendix C) relies upon the overruled doctrine of *Frank v. Maryland, supra,* to show that mere acquiescence to authority is sufficient to justify a warrantless search and seizure by an inspector held specifically to be unreasonable in both *Camara* and *See.*

B. The Opinion Below Unreasonably and Unfairly Discriminates Against Businesses and People Employed in Businesses.

When the Fourth Amendment is applied to persons accused of crime, such as drug peddlers, burglars, robbers and murderers, the Court of Appeals for the Ninth Circuit has held that there can be no waiver of a constitutional inhibition against searches and seizures nor can there be any consent to a search and seizure unless the evidence in the trial court establishes that the words used by the defendants reflected (1) an understanding, (2) uncoerced and (3) an unequivocal election to grant the officers a license which (4) the defendant knew might be freely and effectively withheld. Mere acquiescence to authority such as "Go ahead" or "Go ahead, I have nothing to hide" or other similar expressions do not amount to a consent.

> *Schoepflin and Smith v. United States,* 391 F. 2d 398 (CCA 9, 1968).

In addition *Schoepflin and Smith, supra,* require that there be an express finding by the trial court supported by evidence.

> See also: *Cipres v. United States,* 343 F. 2d 95, 97 (CCA 9, 1965).

The same doctrine is expressed by this Court in *Bumper v. North Carolina,* 88 S. Ct. 1788, 1790 (June 3, 1968). In the opinion below (Appendix C) the

Ninth Circuit has simply held that these principles established for the protection of citizens do not apply to a businessman, a basic idea which was expressed in *Frank v. Maryland, supra,* and rejected in *Camara* and *See, supra.* It is discrimination to hold that a different standard of waiver or consent applies to a business man that applies to drug peddlers, murderers, robbers and burglars. That this is an intentional discrimination is clear from the Court's opinion (Appendix C, p. 4) where it states:

> "We hold that the absence of coercive circumstances and the credibility of a consent given to an inspection justify a departure from the *Schoepflin* rule in cases of administrative inspection."

It is to be observed that the Court not only held as a general matter that a different rule should be applied, but in Footnote 4, page 5, the Court states that there is a difference between "white collar" and "blue collar" crime.

C. There Is a Conflict Among Courts of Appeals.

In a virtually identical case, the Eighth Circuit came to the opposite opinion to that of the Ninth Circuit in this case.

> *United States v. J. B. Kramer Grocery Co., Inc.*, 294 F. Supp. 65. (USDC Ark. 1969), affirmed 418 F. 2d 987 (CCA 9, 1969).

In the *J. B. Kramer* case the Court recognizes and enforces the principles for determining whether or not there was a mere acquiescence or an understanding consent uncoerced and unequivocal election to grant a li-

cense which the defendant knew might be freely and effectively withheld. *J. B. Kramer* also follows *Bumper v. North Carolina, supra.* It follows *Camara* and *See.*

Although it went up on a prosecution for refusal to permit inspection, *United States v. Stanack Sales Co.*, 387 F. 2d 849 (CCA 3, 1968) in fact holds the same principles as the *J. B. Kramer* case. We are also informed that in the Third Circuit evidence acquired as in this case is suppressed because of the *Stanack Sales Co.* case.

D. 21 U.S.C. 374(a) Is Unconstitutional by Camara and See Standards.

It is important to the entire profession and to the entire country that the question of the correct interpretation and application of 21 U.S.C. 374(a) be established by this Court in view of the doctrine of *Camara* and *See* requiring that the citizen be given an opportunity to put a neutral magistrate between the Government inspectors and himself and that a subpena limited in scope, relevant in purpose and specific in directive must be used. Further, the decision to enter and inspect may not be the product of the unreviewed discretion of the enforcement officer in the field. Here, it was clearly the unreviewed discretion of the enforcement officer in the field.

E. The Discretion of the Food and Drug Administration.

We submit that the constitutional right of the FDA to determine whom it will prosecute must be limited to some standard and this Court should determine its powers under Section 336 of Title 21, U.S.C.

F. The Issues Are Important Questions of Law.

We submit that these issues are fundamental to all business regulated by the Government through means of criminal statutes. *Camara* and *See* are a splendid start in the recognition of constitutional rights for those engaged in business and their employees. As the Court observed in *See*, the refinements and complete doctrine must be established by this Court on a case by case basis. Because of the confusion among the Circuits, the suggestion of discrimination between white collar and blue collar crime, the suggestion here that businessmen should not have the same constitutional rights as criminals, and the importance to business all over the country of the matters here involved, we urge the Court that it should review this case and based on the facts of this case, write its opinion concerning the matters presented.

VII.
Conclusion.

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted.

WILLIAM J. CURRER, JR.,
Counsel for Petitioners.

APPENDIX A.

Order Denying Defendants' Motion to Suppress.

United States District Court, Central District of California.

United States of America, Plaintiff, v. Thriftimart, Inc., a Corporation; dba Smart & Final Iris Co., and Gil P. Stewart; William Todd, Sr., and Robert D. Jensen, Defendants. No. 1712-CD.

This cause having come before the Court upon the motion of the defendants to suppress as evidence various samples obtained as well as statements made by the defendants.

IT IS ORDERED that the motion to suppress be denied.

IT IS FURTHER ORDERED that the clerk, this day serve a copy of this Order by the United States mail upon the plaintiff and defendants.

DATED: This 29 day of May, 1968.

E. AVERY CRARY

United States District Judge

APPENDIX B.

Judgment.

United States District Court for the Central District of California.

United States of America v. Gilbert P. Stewart, charged as Gil P. Stewart (Charged in all 8 counts). No. 1712—Criminal.

On the 15th day of July, 1968 came the attorney for the government and the defendant appeared in person and by counsel, William Currer, Jr.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a finding by the Court of guilty to counts 1, 2, 3, 4, 5, 7 & 8, of the offense of Adulteration of food in violation of Federal Food, Drug and Cosmetic Act, in violation of Title 21, U.S.C., Sections 333(a), 331(k), 342(a)(3), 342(a)(4), 321(f), (Defendant acquitted on Count 6.) as charged in the Information in 8 counts and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby sentenced to pay a total fine to the United States of America in the sum of $300.00.

IT IS ADJUDGED that on July 29, 1968, the Court denied plaintiff's motion for assessment of costs.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United

States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ E. AVERY CRARY
E. Avery Crary
United States District Judge

Wayne E. Payne
Wayne E. Payne,
Deputy Clerk

Filed: July 29, 1968.
John A. Childress, Clerk.

Judgment.

United States District Court for the Central District of California.

United States of America v. Robert D. Jensen (Charged in counts 5 & 6 only). No. 1712-Criminal.

On the 15th day of July, 1968 came the attorney for the government and the defendant appeared in person and by counsel. William Currer, Jr.,

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a finding of guilty to Count 5 of the offense of Adulteration of food in violation of Federal Food, Drug and Cosmetic Act, in violation of Title 21, U.S.C., Sections 333(a), 331(k), 342(a)(d), 521(f), (Defendant acquitted on Count 6) as charged in the Information in 8 counts and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby sentenced to pay a total fine to the United States of American in the sum of $100.00.

IT IS ADJUDGED that, on July 29, 1968, the Court denied plaintiff's motion for assessment of costs.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ E. AVERY CRARY
E. Avery Crary
United States District Judge.

/s/ Wayne E. Payne
Wayne E. Payne,
Deputy Clerk.

Filed: July 29, 1968.

John A. Childress, Clerk.

Judgment.

United States District Court for the Central District of California.

United States of America v. Thriftimart, Inc., a corporation, doing business as Smart & Final Iris Co. (Charged in all 8 Counts) No. 1712—Criminal.

On the 15th day of July, 1968 came the attorney for the government and the defendant appeared in person and by counsel, William Currer, Jr.

IT IS ADJUDGED that the defendant has been convicted upon its plea of not guilty and a finding by the Court of guilty to counts 1, 2, 3, 4, 5, 7 & 8, of the offense of Adulteration of food in violation of Federal Food, Drug and Cosmetic Act, in violation of 21 U.S.C., 333(a), 331(k), 342(a)(3), 342(a)(4), 321 (f), (Defendant acquitted on Count 6.) as charged in the Information in 8 counts and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby sentenced to pay a fine to the United States of America in the total sum of $750.00.

IT IS ADJUDGED that, on July 29, 1968, the Court denied plaintiff's motion for assessment of costs.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ E. AVERY CRARY
E. Avery Crary
United States District Judge.

/s/ Wayne E. Payne
Wayne E. Payne,
Deputy Clerk.

Filed: July 29, 1968.
John A. Childress, Clerk.

Judgment.

United States District Court for the Central District of California.

United States of America v. William Todd, Sr. (Charged in Counts 1 & 2 only). No. 1712—Criminal.

On the 15th day of July, 1968 came the attorney for the government and the defendant appeared in person and by counsel, William Currer, Jr.,

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a finding by the Court of Guilty to counts 1 & 2 of the offense of Adulteration of food in violation of Federal Food, Drug and Cosmetic Act, in violation of 21 U.S.C., Sections 333(a), 331(k), 342(a)(3), 342(a)(4), 321(f), as charged in the Information in 8 counts and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty, as charged and convicted.

IT IS ADJUDGED that the defendant is hereby sentenced to pay a total fine to the United States of America in the sum of $200.00.

IT IS ADJUDGED that on July 29, 1968, the Court denied plaintiff's motion for assessment of costs.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ E. AVERY CRARY
E. Avery Crary
United States District Judge.
/s/ Wayne E. Payne
Wayne E. Payne,
Deputy Clerk.

Filed: July 29, 1968
John A. Childress, Clerk

APPENDIX C.

Judgment.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Thriftimart, Inc., a corporation dba Smart & Final Iris Co.; Gil P. Stewart; Wm. Todd, Sr.; and Robert D. Jensen, individuals, Defendants-Appellants. No. 23,485.

July 7, 1970.

On Appeal from the United States District Court for the Central District of California.

Before: Merrill and Trask, Circuit Judges, and Pence, District Judge.*

MERRILL, Circuit Judge:

Appellants have been convicted of violations of the Federal Food, Drug & Cosmetic Act, 21 U.S.C. §331-(k) and §333(a).[1] Upon inspection, food in four company warehouses had been found to be infested with insects. Appellants Stewart was supervisor of all company cash and carry wholesale warehouses. Appel-

---

*Honorable Martin Pence, United States District Judge for the District of Hawaii, sitting by designation.

[1] "§331. *Prohibited acts.*

The following acts and the causing thereof are prohibted:

* * *

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded."

Section 333(a) provides penalty.

lants Todd and Jensen were managers of two of the warehouses. Fines were imposed on all appellants.

The principal issue of appeal relates to the constitutionality of searches of appellants' warehouses conducted by Food & Drug Administration (FDA) inspectors. The inspections were routine and similar ones had been conducted periodically in the past. The inspectors testified that on arrival at the warehouses they approached the managers, filled out and presented their notices of inspection, requested permission to inspect and in each case were told, "Go ahead" or words of similar import. The inspection notices contained a recitation of 21 U.S.C. §374(a), which authorizes FDA inspectors to enter at reasonable times to inspect food warehouses. The inspectors did not have search warrants nor did they advise the warehouse managers that they had a right to insist upon a search warrant.

Appellants contend that this warrantless inspection was unconstitutional under *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *See v. Seattle*, 387 U.S. 541 (1967). The precise issue raised is whether the informal and casual consent to search given by the warehouse managers made it unnecessary to secure a search warrant. Appellants argue that a waiver of search warrant "cannot be conclusively presumed from a verbal expression of assent. The court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant officers a license which the person knows may be freely and effectively withheld." *Cipres v. United States*, 343 F.2d 95, 97 (9th Cir. 1965), *cert. denied*, 385 U.S. 826 (1966); *Schoepflin v. United States*, 391 F.2d 390 (9th Cir.), *cert. denied*, 393 U.S.

865 (1968). Since the managers were not warned that they had a right to refuse entry and since there was no proof that they knew they had such a right, appellants argue that the consent was not effective to remove the need for a search warrant.

The definition of consent to search as set forth in *Cipres* and *Schoepflin* was the product of judicial experience in cases involving searches for evidence of a crime. The Supreme Court has long recognized that such criminal searches are not the legal equivalent of administrative inspections, and it was not until *See* and *Camara* in 1967 that the Court even applied the Fourth Amendment to the administrative search.[2] And in *See* and *Camara*, the Court clearly recognized that administrative searches must be viewed differently than criminal searches, and that their constitutionality must be tested by different standards.

First, the probable cause showing before a magistrate is entirely different. There need be no probable cause to suppose a violation to support a warrant to inspect. All that is required is a showing that reasonable administrative standards for inspection have been established and are met in the inspection in question. 387 U.S. at 538. Further, as stated in *Camara*, the administrative search is "neither personal in nature nor aimed at the discovery of evidence of crime" and thus involves "a relatively limited invasion of the urban citizen's privacy." 387 U.S. at 537. The Court quotes *Frank v. Maryland*, 359 U.S. 360 (1959) (although over-ruled), with every evidence of approval, as stating

---

[2]*See* and *Camara* do not deal with the exclusionary rule in this context; they only held that one cannot be charged with crime for insisting upon a warrant as a condition to access to his premises.

that due to the public importance of the inspection process it should not be "hobbled by the blanket requirement of the safeguards necessary for a search of evidence of criminal acts." 387 U.S. at 537.

Moreover, while in the case of the search for evidence of crime the Supreme Court has repeatedly urged the desirability of securing a search warrant where time permits, here "most citizens allow inspection of their property without a warrant" and "it seems likely that warrants should normally be sought only after entry is refused * * *" 387 U.S. at 539. *See* suggests that it would be unreasonable to do otherwise save in a case where the element of surprise is crucial to the success of the operation. 387 U.S. at 545 n. 6. That subjecting inspection to the warrant procedure is not intended to upset past practices is emphasized. In *Camara* it is stated that the Court's holding "does not suggest any change in what seems to be the prevailing local policy, in most situations, of authorizing entry, but not by force, to inspect." 387 U.S. at 540. In *See* the Court characterized the warrant process as "minimal limitations on administrative action." 387 U.S. at 545.

It is clear, therefore, that the administrative search is to be treated differently than the criminal search. The issue in this case is whether the body of law that has grown up around the definition of consent to a search in the criminal area should mechanically be applied to the inspection of a warehouse.

In a criminal search the inherent coercion of the badge and the presence of armed police make it likely that the consent to a criminal search is not voluntary. Further, there is likelihood that confrontation comes as a surprise for which the citizen is unprepared and

the subject of a criminal search will probably be uninformed as to his rights and the consequences of denial of entry.[3] Finally, the consent given to a fruitful search in a criminal case is inherently suspect. A criminal with something to hide is not likely to turn it over to the police on request unless he believes that he has no choice. Nor, in the common experience of man, is one embroiled with the law likely to relieve the state of its heavy burden before the magistrate if he knows he need not do so.

These circumstances are not present in the administrative inspection.[4] The citizen is not likely to be uninformed or surprised. Food inspections occur with regularity. As here, the judgment as to consent to access is often a matter of company policy rather than of local managerial decision. FDA inspectors are unarmed and make their inspections during business hours. Also, the consent to an inspection is not only suspect but is to be expected. The inspection itself is inevitable. Nothing is to be gained by demanding a warrant except that the inspectors have been put to trouble—an unlikely aim for the businessman anxious for administrative good will.

We hold that the absence of coercive circumstances and the credibility of a consent given to an inspection justify a departure from the *Schoepflin* rule in

---

[3]In *Schoepflin*, for instance, the search was made at 1 a.m. by six police officers who had come to Schoepflin's apartment; Schoepflin's consent to the search had obviously been given a coercive atmosphere.

[4]The factual differences between the business inspection and the criminal search are sufficient to answer appellants' contention that fairness requires the rigid application of the same rules to "white collar" and "blue collar" crime.

cases of administrative inspection. Here, the managers were asked for permission to inspect; the request implied an option to refuse and present an opportunity to object to the inspection in an atmosphere uncharged with coercive elements.[5] The fact that the inspectors did not warn the managers of their right to insist upon a warrant and the possibility that the managers were not aware of the precise nature of their rights under the Fourth Amendment did not render their consent unknowing or involuntary. They, as representatives of Thriftimart, Inc., were presented with a

---

[5]Appellants contend that the notices of inspection vitiated their consent since the notices indicated that there was no right to refuse entry. The notices recited 21 U.S.C. §374(a) and 15 U.S.C. §1271 which provide that FDA inspectors are authorized to enter and inspect warehouses. In the unlikely event that the managers read these quoted statutes given in small print on the notice, they would not have been coerced by the statutory language. The quoted statutes merely establish the authority of the FDA to make inspections, either under warrant or by consent. One of the notices also contained a recitation of 21 U.S.C. §331(q), which makes it a crime to refuse entry to inspect records dealing with depressant and stimulant drugs. If the appellant warehouse managers read this statute quoted on the notice of inspection, they would have seen that it was wholly inapplicable to inspections of food warehouses.

There is a statute that makes it a crime to refuse entry to an FDA inspector seeking entry under §374(a). 21 U.S.C. §331(f). Prior to the searches in this case, *See* had of course rendered this statute unenforceable in the absence of warrant. Appellants contend that they were aware of this statute and therefore had reason to fear criminal prosecution if they refused entry. But knowledge of the provisions of 331(f) did not vitiate the voluntariness of their consent. They were asked permission to search and voiced no objection. There is no indication that permission to inspect was granted solely out of fear of criminal sanction. On the contrary, it appears from defense counsel's own admission that he had advised the corporation and its officers to co-operate with FDA inspectors as a matter of sound business policy and not because he was unaware that he could force the inspectors to get search warrants. The managers' individual awareness of §331(f) is thus unimportant: their consent was not given out of fear of criminal penalty but in accordance with company policy.

clear opportunity to object to the inspection and were asked if they had any objection. Their manifestation of assent, no matter how casual, can reasonably be accepted as waiver of warrant.[6]

In conclusion, we hold that in the context of the exclusionary rule a warrantless inspectorial search of business premises is reasonable when entry is gained not by force or misrepresentation, but is, with knowledge of its purpose, afforded by manifestation of assent. Lack of warrant under these circumstances did not render the inspections unreasonable under the Fourth Amendment. *United States v. Hammond Milling Co.*, 413 F.2d 608 (5th Cir. 1969), *cert. denied*, 396 U.S. 1002 (1970).[7]

We have examined appellants' remaining contentions and find them without merit. Advance notice of inspection under 21 U.S.C. §374(a) is not necessary, as its language and legislative history indicate. 2 U.S. Code, Cong. & Admin. News 1953, at 2198-2205. The necessity and constitutionality of a surprise search was expressly upheld in *See*, 387 U.S. at 545 n. 6. The definitions of adulterated food in 21 U.S.C. §342(a)(3) and §342(a)(4) are sufficiently definite to sustain a criminal prosecution. *Golden Grain Macaroni Co. v. United States*, 209 F.2d 166, 168 (9th Cir. 1953); *Berger v. United States*, 200 F.2d 818 (8th Cir. 1952). 21

---

[6]Appellants also contend that they should have been given *Miranda* warnings at the time of the search. *Miranda v. Arizona*, 384 U.S. 436 (1966). Such warnings were unnecessary since appellants were not in custody. *See Spahr v. United States*, 409 F.2d 1303 (9th Cir.), *cert. denied*, 396 U.S. 840 (1969).

[7]The situation presented in *United States v. J. B. Kramer Grocery Co.*, 418 F.2d 987 (8th Cir. 1969), is distinguishable in that in *Kramer* the FDA inspector insisted on his right to search without warrant over the objections of the warehouse manager.

U.S.C. §336 giving the FDA discretion whether to proceed criminally or civilly is constitutional; the FDA is not required to prosecute every violation. *United States v. 449 Cases Containing Tomato Paste*, 212 F.2d 567, 572 (2d Cir. 1954). Nor need the FDA announce at the outset whether it wishes to proceed criminally or civilly. *United States v. Kordel*, 397 U.S. 1 (1970).

Judgment affirmed.

APPENDIX D.

On Petition for Rehearing.

In the United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Thriftimart, Inc., a corporation doing business as Smart & Final Iris Co., and Gil P. Stewart, William Todd, Sr., and Robert D. Jensen, individuals, Defendants-Appellants. No. 23,485.

Before: Merrill and Trask, Circuit Judges, and Pence, District Judge

Rehearing is denied.

The suggestion of a rehearing in banc is rejected for failure to comply with our Rule 12.

Dated: August 3, 1970.

APPENDIX E.

21 U.S.C., Section 331, provides as follows:

"§ *331. Prohibited acts*

"The following acts and the causing thereof are prohibited:

* * *

"(f) The refusal to permit entry or inspection as authorized by section 374 of this title.

* * *

"(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded."

21 U.S.C., Section 332, provides as follows:

"§ *332. Injunction proceedings—Jurisdiction of courts*

"(a) The district courts of the United States and the United States courts of the Territories shall have jurisdiction, for cause shown, and subject to the provisions of section 381 (relating to notice to opposite party) of Title 28, as amended, to restrain violations of section 331 of this title, except paragraphs (h)-(j) of said section. As amended Oct. 10, 1962, Pub.L. 87-781, Title I, § 103(d), Title II, § 201(c), 76 Stat. 784, 793.

"*Violation of injunction*

"(b) In case of violation of an injunction or restraining order issued under this section, which also constitutes a violation of this chapter, trial shall be by the

court, or, upon demand of the accused, by a jury. Such trial shall be conducted in accordance with the practice and procedure applicable in the case of proceedings subject to the provisions of section 387 of Title 28, as amended. June 25, 1938, c. 675, § 302, 52 Stat. 1043."

21 U.S.C., Section 333, provides as follows:

"§ *333. Penalties—Violation of section 331 of this title*

"(a) Any person who violates any of the provisions of section 331 of this title shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine: *Provided, however*, That any person who, having attained his eighteenth birthday, violates section 331(q) (2) of this title by selling, delivering, or otherwise disposing of any depressant or stimulant drug to a person who has not attained his twenty-first birthday shall, if there be no previous conviction of such person under this section which has become final, be subject to imprisonment for not more than two years, or a fine of not more than $5,000, or both such imprisonment and fine, and for the second or any subsequent conviction for such a violation shall be subject to imprisonment for not more than six years, or a fine of not more than $15,000, or both such imprisonment and fine.

"Same; with intent to defraud or mislead

"(b) Notwithstanding the provisions of subsection (a) of this section, in case of a violation of any of the provisions of section 331 of this title, with intent to defraud or mislead, the penalty shall (except in the case of an offense which is subject to the provisions of the proviso to subsection (a) of this section relating to second or subsequent offenses) be imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.

"Exceptions in certain cases of good faith, etc.

"(c) No person shall be subject to the penalties of subsection (a) of this section, (1) for having received in interstate commerce any article and delivered it or proffered delivery of it, if such delivery or proffer was made in good faith, unless he refuses to furnish on request of an officer or employee duly designated by the Secretary the name and address of the person from whom he purchased or received such article and copies of all documents, if any there be, pertaining to the delivery of the article to him; or (2) for having violated section 311(a) or (d) of this title, if he establishes a guaranty or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect, in case of an alleged violation of section 311(a) of this title, that such article is not adulterated or misbranded, within the meaning of this chapter designating this chapter or to the effect, in case of an alleged violation of section 311(d) of this title, that such article is not an article which may not, under the provisions of section 344 or 355 of this title, be introduced into interstate commerce; or (3) for having

violated section 311(a) of this title, where the violation exists because the article is adulterated by reason of containing a color additive not from a batch certified in accordance with regulations promulgated by the Secretary under this chapter, if such person establishes a guaranty or undertaking signed by, and containing the name and address of, the manufacturer of the color additive, to the effect that such color additive was from a batch certified in accordance with the applicable regulations promulgated by the Secretary under this chapter; or (4) for having violated section 331(b), (c) or (k) of this title by failure to comply with section 352(f) of this title in respect to an article received in interstate commerce to which neither section 353(a) nor (b) (1) of this title is applicable, if the delivery or proffered delivery was made in good faith and the labeling at the time thereof contained the same directions for use and warning statements as were contained in the labeling at the time of such receipt of such article; or (5) for having violated section 331(i) (2) of this title if such person acted in good faith and had no reason to believe that use of the punch, die, plate, stone, or other things involved would result in a drug being a counterfeit drug, or for having violated section 331(i) (3) of this title if the person doing the act or causing it to be done acted in good faith and had no reason to believe that the drug was a counterfeit drug. As amended July 15, 1965, Pub.L. 89-74, §§ 7, 9(d), 79 Stat. 233, 235."

21 U.S.C., Section 334, provides as follows:

"§ *334. Seizure—Grounds and jurisdiction*

"(a)(1) Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce, or which may not, under the provisions of section 344 or 355 of this title, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: . . ."

21 U.S.C., Section 336, provides as follows:

"§ *336. Report of minor violations*

"Nothing in this chapter shall be construed as requiring the Secretary to report for prosecution, or for the institution of libel or injunction proceedings, minor violations of this chapter whenever he believes that the public interest will be adequately served by a suitable written notice or warning. June 25, 1938, c. 675, § 306, 52 Stat. 1045; 1940 Reorg. Plan No. IV, § 12, eff. June 30, 1940, 5 F.R. 2422, 54 Stat. 1237; 1953 Reorg. Plan No. 1, §§ 5, 8 eff. April 11, 1953, 18 F.R. 2053, 67 Stat. 631."

21 U.S.C., Section 342, provides as follows:

"§ *342. Adulterated food*

"A food shall be deemed to be adulterated—

"*Poisonous, insanitary, etc., ingredients*

"(a) (1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added sub-

stance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health; or (2) (A) if it bears or contains any added poisonous or added deleterious substance (other than one which is (i) a pesticide chemical in or on a raw agricultural commodity; (ii) a food additive; or (iii) a color additive) which is unsafe within the meaning of section 346 of this title, or (B) if it is a raw agricultural commodity and it bears or contains a pesticide chemical which is unsafe within the meaning of section 346a (a) of this title, or (C) if it is, or it bears or contains, any food additive which is unsafe within the meaning of section 348 of this title: *Provided*, That where a pesticide chemical has been used in or on a raw agricultural commodity in conformity with an exemption granted or a tolerance prescribed under section 346a of this title and such raw agricultural commodity has been subjected to processing such as canning, cooking, freezing, dehydrating, or milling, the residue of such pesticide chemical remaining in or on such processed food shall, notwithstanding the provisions of sections 346 and 348 of this title, not be deemed unsafe if such residue in or on the raw agricultural commodity has been removed to the extent possible in good manufacturing practice and the concentration of such residue in the processed food when ready to eat is not greater than the tolerance prescribed for the raw agricultural commodity; or (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or (4) if it has been prepared, packed, or held under insanitary conditions whereby it may have been

rendered injurious to health; or (5) if it is, in whole or in part, the product of a diseased animal or of an animal which had died otherwise than by slaughter; or (6) if its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health; or (7) if it has been intentionally subjected to radiation, unless the use of the radiation was in conformity with a regulation or exemption in effect pursuant to section 348 of this title."

* * *

21 U.S.C., Section 346, provides as follows:

"§346. *Tolerance for poisonous or deleterious substances in food; regulations*

"Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice shall be deemed to be unsafe for purposes of the application of clause (2) (A) of section 342(a) of this title; but when such substance is so required or cannot be so avoided, the Secretary shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe for purposes of the application of clause (2) (A) of section 342(a) of this title. While such a regulation is in effect limiting the quantity of any such substance in the case of any food, such food shall not, by reason of bearing or containing any added amount of such substance, be considered to be adulterated within the meaning of clause (1) of section 342(a) of this title. In determining the quantity of such added

substance to be tolerated in or on different articles of food the Secretary shall take into account the extent to which the use of such substance is required or cannot be avoided in the production of each such article, and the other ways in which the consumer may be affected by the same or other poisonous or deleterious substances. June 25, 1938, c. 675, § 406, 52 Stat. 1049; 1940 Reorg. Plan No. IV, § 12, eff. June 30, 1940, 5 F.R. 2422, 54 Stat. 1237; 1953 Reorg. Plan No. 1, §§ 5, 8, eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat. 631; Sept. 6, 1958, Pub.L. 85-929, § 3(c), 72 Stat. 1785; July 12, 1960, Pub.L. 86-618, Title I, § 103(a) (1), 74 Stat. 398."

21 U.S.C., Section 372(a), provides:

"§ *372. Examinations and investigations—Authority to conduct*

(a) The Secretary is authorized to conduct examinations and investigations for the purposes of this chapter through officers and employees of the Department or through any health, food or drug officer or employee of any State, Territory, or political subdivision thereof, duly commissioned by the Secretary as an officer of the Department. In the case of food packed in the Commonwealth of Puerto Rico or a Territory, the Secretary shall attempt to make inspection of such food at the first point of entry within the United States when, in his opinion and with due regard to the enforcement of all the provisions of this chapter, the facilities at his disposal will permit of such inspection. For the purposes of this subsection the term 'United States' means the States and District of Columbia."

21 U.S.C., Section 373, provides as follows:

"§ *373. Records of interstate shipment*

"For the purpose of enforcing the provisions of this chapter, carriers engaged in interstate commerce, and persons receiving food, drugs, devices, or cosmetics in interstate commerce or holding such articles so received, shall upon the request of an officer or employee duly designated by the Secretary, permit such officer or employee, at reasonable times, to have access to and to copy all records showing the movement in interstate commerce of any food, drug, device, or cosmetic, or the holding thereof during or after such movement, and the quantity, shipper, and consignee thereof; and it shall be unlawful for any such carrier or person, to fail to permit such access to and copying of any such record so requested when such request is accompanied by a statement in writing specifyng the nature or kind of food, drug, device, or cosmetic to which such request relates: *Provided,* That evidence obtained under this section shall not be used in a criminal prosecution of the person from whom obtained: *Provided further,* That carriers shall not be subject to the other provisions of this chapter by reason of their receipt, carriage, holding, or delivery of food, drugs, devices, or cosmetics in the usual course of business as carriers. June 25, 1938, c. 675, § 703, 52 Stat. 1057; 1940 Reorg. Plan No. IV, § 12, eff. June 30, 1940, 5 F.R. 2422, 54 Stat. 1237; 1953 Reorg. Plan No. 1, §§ 5, 8, eff. Apr. 11, 1953, 18 F. R. 2053, 67 Stat. 631;"

21 U.S.C., Section 374(a), provides as follows:

"§ *374. Inspection—Right of agents to enter; scope of inspection; notice; promptness; exclusions*

"(a) For purposes of enforcement of this chapter, officers or employees duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner, operator, or agent in charge, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held, for instruction into interstate commerce or after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, or cosmetic in interstate commerce; and (2) to inspect, at reasonable times and within reasonable limits and in a reasonable manner, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials; containers, and labeling therein. * * *

"Written report to owner; copy to Secretary

"(b) Upon completion of any such inspection of a factory, warehouse, consulting laboratory or other establishment, and prior to leaving the premises, the officer or employee making the inspection shall give to the owner, operator, or agent in charge a report in writing setting forth any conditions or practices observed by him which, in his judgment, indicate that any food, drug, device, or cosmetic in such establishment (1) consists in whole or in part of any filthy, putrid, or decomposed substance, or (2) has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth,

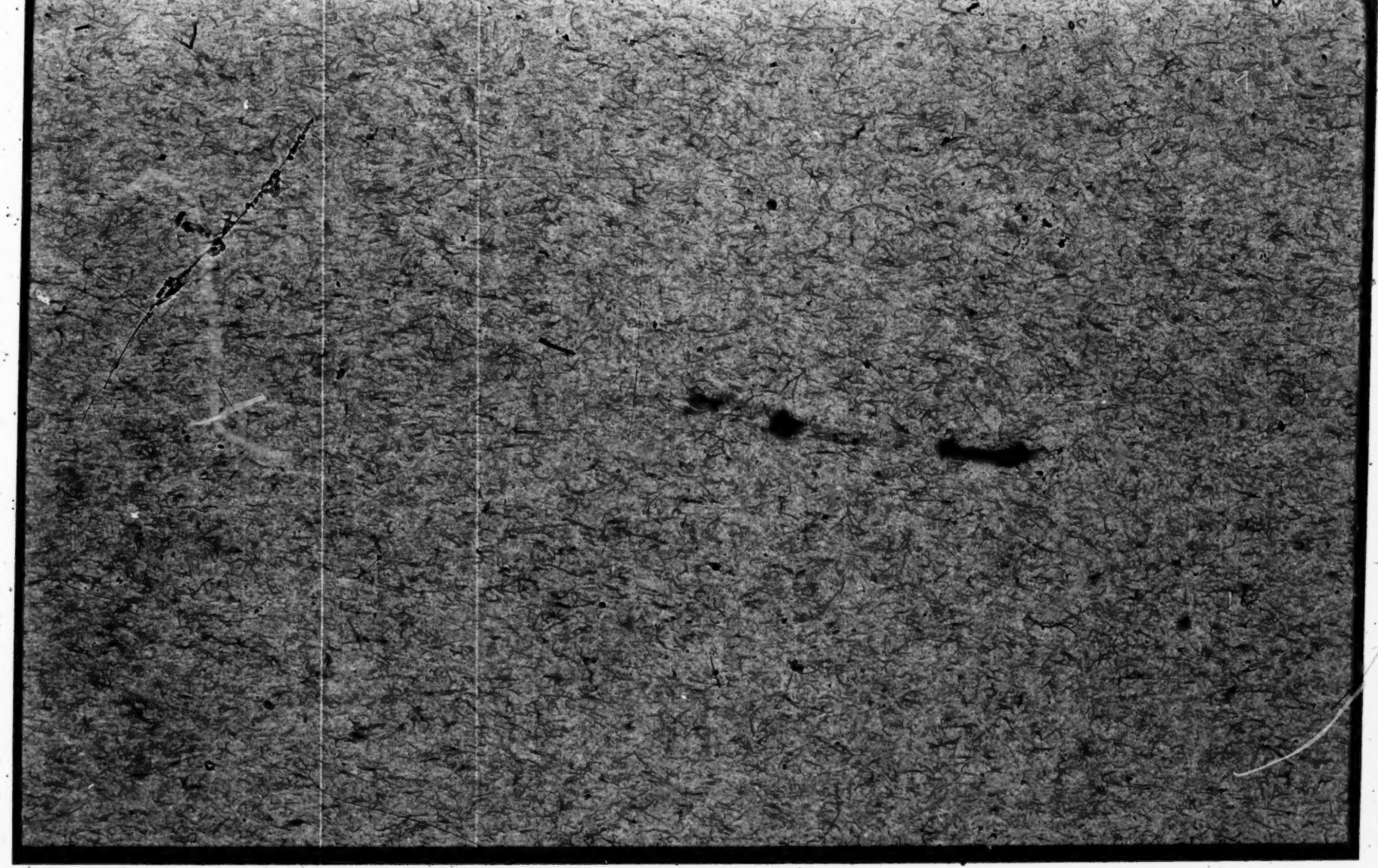
or whereby it may have been rendered injurious to health. A copy of such report shall be sent promptly to the Secretary.

"Receipt for samples taken

"(c) If the officer or employee making any such inspection of a factory, warehouse, or other establishment has obtained any sample in the course of the inspection, upon completion of the inspection and prior to leaving the premises he shall give to the owner, operator, or agent in charge a receipt describing the samples obtained.

"Analysis of samples furnished owner

"(d) Whenever in the course of any such inspection of a factory or other establishment where food is manufactured, processed, or packaged, the officer or employee making the inspection obtains a sample of any such food, and an analysis is made of such sample for the purpose of ascertaining whether such food consists in whole or in part of any filthy, putrid, or decomposed substance, or is otherwise unfit for food, a copy of the results of such analysis shall be furnished promptly to the owner, operator, or agent in charge. June 25, 1938, c. 675, § 704, 52 Stat. 1057; 1940 Reorg. Plan No. IV, § 12, eff. June 30, 1940, 5 F.R. 2422, 54 Stat. 1237; 1953 Reorg. Plan No. 1, §§5, 8, eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat. 631; Aug. 7, 1953, c. 350, § 1, 67 Stat. 476; Oct. 10, 1962, Pub. L. 87-781, Title II, § 201(a), (b), 76 Stat. 792."



In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 627

THRIFTIMART, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the Central District of California, petitioners, a wholesale groceries corporation and three of its employees, were convicted of violating 21 U.S.C. 331(k) and 333(a), on the basis of the fact that food in four company warehouses was found, upon inspection, to be infested with insects. They were sentenced to pay fines ranging from $100 to $750. The court of appeals affirmed the conviction (Pet. App. C).

405-624—70

The principal issue raised by petitioners here, as in the court below, relates to the validity under *See* v. *City of Seattle*, 387 U.S. 541, and *Camara* v. *Municipal Court*, 387 U.S. 523, of their consent to the inspections by Food and Drug Administration agents of their warehouse premises without a warrant. The issue is fully discussed in the opinion of the court below, on which we rely.

The present case is virtually identical on the consent and inspection-without-a-warrant question to *United States* v. *Hammond Milling Co.*, 413 F. 2d 608 (C.A. 5), certiorari denied, 396 U.S. 1002; see also *United States* v. *Alfred M. Lewis, Inc.*, C.A. 9, No. 24,095, decided July 10, 1970, pending on a petition for a writ of certiorari, No. 511, this Term.[1] There is no conflict with *United States* v. *J. B. Kramer Grocery Co.*, 418 F. 2d 987 (C.A. 8), and *United States* v. *Stanack Sales Co.*, 387 F. 2d 849 (C.A. 3), relied on by petitioner, where the courts found, in different circumstances (see Pet. App. A, 14, n. 7), that the consent given was not voluntary but a submission to authority. Cf. *Bumper* v. *North Carolina*, 391 U.S. 543.[2]

---

[1] We are providing petitioner's counsel with a copy of our memorandum in opposition in No. 511.

[2] It is not clear whether the principle of *See* and *Camara*—that absent consent a warrant is required—is applicable to Food and Drug inspections. Compare *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72; cf. Brief for the United States in *Colonnade*, p. 27, n. 23; memorandum in opposition in *Alfred M. Lewis, Inc.*, *supra*. The Food and Drug Administration has, in any event, promulgated regulations providing that its inspectors should obtain a warrant where consent to search is refused.

The court below properly rejected petitioners' contention that their prosecution was invalid because the Food and Drug Administration has not promulgated regulations indicating under what circumstances the agency would proceed criminally against those committing statutory violations. Whether a recommendation for criminal prosecution should be made in a particular case to the Attorney General or a United States Attorney (who must exercise their own discretion in determining whether to follow the recommendation) is a question to be resolved solely within the discretion of the agency based upon its evaluation of all the facts before it. Cf. *United States* v. *Kordel*, 397 U.S. 1, 11. There is no indication of any abuse of such discretion in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1970.

U.S. GOVERNMENT PRINTING OFFICE 1970

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 14 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970.
No. 627

THRIFTIMART, INC., a corporation doing business as SMART & FINAL IRIS CO., GILBERT P. STEWART, WILLIAM TODD, SR., and ROBERT D. JENSEN, individuals,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Reply to Memorandum for the United States in Opposition to Petition.

WILLIAM J. CURRER, JR.,
548 South Spring Street,
Suite 939,
Los Angeles, Calif. 90013,
(213) 628-9152,
Counsel for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 685-9790

TABLE OF AUTHORITIES CITED

Cases	Page
Bumper v. North Carolina, 88 S. Ct. 1788, 391 U.S. 543	2, 3
Cipres v. United States, 343 F. 2d 95	2
Colonnade Catering Corp. v. United States, 397 U.S. 72	4
Schoepflin and Smith v. United States, 391 F. 2d 398	2
United States v. J. B. Kramer Grocery Co., 418 F. 2d 987	2, 3
United States v. Stanack Sales Co., 387 F. 2d 849	2
Statutes	
United States Code, Title 21, Sec. 331(f)	3
United States Code, Title 21, Sec. 331(k)	3
United States Code, Title 21, Sec. 336	3
United States Code, Title 21, Sec. 342(a)(3)	3
United States Code, Title 21, Sec. 342(a)(4)	3
United States Code, Title 21, Sec. 374(a)	3, 4

IN THE

Supreme Court of the United States

October Term, 1970.
No. 627

THRIFTIMART, INC., a corporation doing business, as SMART & FINAL IRIS CO., GILBERT P. STEWART, WILLIAM TODD, SR., and ROBERT D. JENSEN, individuals,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Reply to Memorandum for the United States in Opposition to Petition.

The Solicitor General has filed very brief memoranda in opposition to the petition of Thriftimart, Inc. *et al.*, No. 627, and the petition of Alfred M. Lewis, Inc., No. 511. The memoranda of the Solicitor General in fact show that there is a serious conflict among the Courts of Appeals and even in the thinking of the Solicitor General, such that a decision and opinion of this Court is necessary to this area of law.

In the memorandum filed by the Solicitor General in 511 appears this statement, "There is no conflict

with *United States v. J. B. Kramer Grocery Co.*, 418 F. 2d 987 (C.A. 8) and *United States v. Stanack Sales Co.*, 387 F. 2d 849 (C.A. 3), relied on by petitioner, where the courts found, on the basis of the particular facts before them, that the consent given was not voluntary but a submission to authority. *Cf. Bumper v. North Carolina*, 391 U.S. 543."

In his memorandum in 627 the Solicitor General says essentially the same thing. Thus he states, "There is no conflict with *United States v. J. B. Kramer Grocery Co.*, 418 F. 2d 987 (C.A. 8), and *United States v. Stanack Sales Co.*, 387 F. 2d 849 (C.A. 3), relied on by petitioner, where the courts found in different circumstances (see Pet. App. A, 14 n. 7), that the consent given was not voluntary, but a submission to authority. *Cf. Bumper v. North Carolina*, 391 U.S. 543."

The significance lies in this:

1. In Thriftimart (627) the Court of Appeals expressly rejects the doctrine of *Bumper v. North Carolina*, 88 S. Ct. 1788, 391 U.S. 543 (1968), *Cipres v. United States*, 343 F. 2d 95 (CCA 9, 1965), and *Schoepflin and Smith v. United States*, 391 F. 2d 398 (CCA 9, 1968) in order to determine that there was consent to the unwarranted intrusion. In short, the Court in Thriftimart says that the measure of determining consent is different because this was "white collar" crime, not "blue collar". Hence, there was no need to show that the waiver of the constitutional privilege reflected an (1) understanding, (2) uncoerced, and (3) unequivocal election to grant inspectors a license to inspect which (4) the party acquiescing knew might be freely and effectively withheld. But in *J. B. Kramer Grocery Co., supra*, the trial court and the Court of

Appeals expressly *followed Bumper v. North Carolina* and hence came to the necessary conclusion that there was *no* consent to the unwarranted intrusion.

2. In both the memorandum filed in Thriftimart, No. 627, and Alfred M. Lewis, Inc., No. 511, the Solicitor General relies on the idea that there was a finding of fact in *J. B. Kramer Grocery Co. v. United States, supra,* determining as a fact that there was no consent and therefore that the evidence must be suppressed. But in Alfred M. Lewis, No. 511, the trial court expressly found on the facts before it that there was no waiver and no consent and therefore that there was a breach of the constitutional rights of defendants which required the suppression of the evidence. We think the Government cannot blow hot and cold on these matters.

3. The memoranda of the Solicitor General conveniently ignores the fact that there are important questions presented by the petitions for certiorari concerning the interpretation and constitutional validity of 21 U.S.C. §§ 374(a), 336; 342(a)(3) and (4), and 331(f) and (k).

4. The Solicitor General also ignores the fact that both the position of the Government in the courts below in this case and No. 511 is an intentional discrimination in criminal prosecution against those engaged in business and designated "white collar" workers as against those who might be classified as "blue collar" workers accused of crime.

The Solicitor General suggests in footnote 2, page 2, of his memorandum in 627 that, "It is not clear whether the principle of *See* and *Camara*—that absent

consent a warrant is required—is applicable to Food and Drug inspections. Compare *Colonnade Catering Corp. v. United States*, 397 U.S. 72; *cf.* Brief for the United States in *Colonnade*, p. 27, n. 23; memorandum in opposition in *Alfred M. Lewis, Inc., supra*."

If this is not clear, then it should be made clear. This suggestion by the Solicitor General in reality comes to this. A statute such as 21 U.S.C. 374(a) is invalid at the hands of the United States Government but void at the hands of the State and local governments. Such discrimination in the constitutional obligations of federal, state and local governments is intolerable. There is no question but that if this suggestion is generally known in administrative circles in the Government of the United States, it will soon be tested to see whether or not this Court will permit Federal administrative agencies to engage in warrantless searches and seizures even though it forbids state and local governments to do the same thing.

It would seem that this Court should grant the petitions for certiorari in both 511 and 627.

Respectfully submitted,

WILLIAM J. CURRER, JR.,
Counsel for Petitioners.

Supreme Court, U.S.
FILED
DEC 18 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970
No. 627

THRIFTIMART, INC., a corporation doing business as SMART & FINAL IRIS CO., GILBERT P. STEWART, WILLIAM TODD, SR., and ROBERT D. JENSEN, individuals,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING ON DENIAL OF WRIT OF CERTIORARI (RULE 58).

WILLIAM J. CURRER, JR.,
548 South Spring Street,
Suite 939,
Los Angeles, Calif. 90013,
(213) 628-9152,
Counsel for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

I.

Intervening Circumstances 3

A. This Court Has Failed to Act Upon a Matter Requiring Resolution in This Term 3

II.

Substantial Grounds 6

III.

Conclusion 7

TABLE OF AUTHORITIES CITED

Cases

Camara v. Municipal Court, 387 U.S. 523, 87 S. Ct. 1727 (1967) 2

Frank v. Maryland, 359 U.S. 360, 79 S. Ct. 804 (1959) 2

Schoepflin & Smith v. United States, 391 F. 2d 398 (CCA 9, 1968) 3

See v. City of Seattle, 387 U.S. 541, 87 S. Ct. 1737 (1967) .....

United States v. J. B. Kramer Grocery Co., Inc., 294 F. Supp. 65 (USDC Ark., 1969), aff'd 418 F. 2d 987 (CCA 8, 1969) 4

Rules

Rules of the United States Supreme Court, Rule 58(2) 2

IN THE

Supreme Court of the United States

October Term, 1970
No. 627

THRIFTIMART, INC., a corporation doing business as SMART & FINAL IRIS CO., GILBERT P. STEWART, WILLIAM TODD, SR., and ROBERT D. JENSEN, individuals,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING ON DENIAL OF WRIT OF CERTIORARI (RULE 58).

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Thriftimart, Inc., a corporation doing business as Smart & Final Iris Co., Gilbert P. Stewart, William Todd, Sr., and Robert D. Jensen, individuals, (hereinafter "petitioners") petition this Court for rehearing of the order denying their Petition for Writ of Certiorari made by this Court November 23, 1970. This Petition

is based on the grounds permitted by Rule 58(2), to wit:

A. Intervening circumstances of substantial and controlling effect.

B. Substantial grounds available to petitioners though not previously presented.

I.

Intervening Circumstances.

A. This Court Has Failed to Act Upon a Matter Requiring Resolution in This Term.

This case presents a clear cut opportunity for this court to accept or reject the decisional discrimination by the Ninth Circuit in favor of criminals committing crimes of violence and against those accused of acts made crimes for the purpose of business regulation. In the opinion of the Ninth Circuit in this case, those accused of "white collar crimes" are treated differently than those accused of "blue collar crimes". We do not understand this discrimination. It is clearly a return to *Frank v. Maryland*, 359 U.S. 360, 79 S. Ct. 804 (1959) which was expressly overruled in *See v. City of Seattle*, 387 U.S. 541, 87 S. Ct. 1737 (1967) and *Camara v. Municipal Court*, 387 U.S. 523, 87 S. Ct. 1727 (1967).

This problem area has become a jungle. Different circuits have arrived at different conclusions by simply taking what they choose out of various parts of these decisions and others. The one opinion that calls a spade a spade is the one written by the Ninth Circuit

in this case which was unable to distinguish the facts of this case on principle from those of violent crimes, crimes involving drugs and marijuana and other depraved activity. The court being unable to distinguish upon principle it simply held that there was a difference between "white collar crimes" and "blue collar crimes". What it really held was that those persons accused of crimes for the purpose of regulation of business being responsible people have no constitutional rights but those persons who engaged in crimes of violence however heinous are to be protected. Usually opinions protecting people accused of crimes of violence are based on the idea that this will ultimately protect the innocent responsible and honest citizen. But the Ninth Circuit here says that isn't the case. The rationale therefore of constitutional rights applied to criminal cases has been undercut.

Since the problem was so precisely posed we assumed that this court would be interested in reviewing this case to give guidance to the circuits.

Two opportunities were presented in this term. One was this case where the court simply failed to make a finding at all as to whether or not there was consent to the search and seizure but the facts showed that there could be no consent measured by the decisions of the Court of Appeals for the Ninth Circuit and the Court of Appeals for the Eighth Circuit.

Schoepflin & Smith v. United States, 391 F. 2d 398 (CCA 9, 1968).

United States v. J. B. Kramer Grocery Co., Inc., 294 F. Supp. 65 (USDC Ark., 1969) affirmed 418 F. 2d 987 (CCA 8, 1969).

The other case submitted to this Court for this term was *A. M. Lewis v. United States*, Docket No. 511, October Term 1970. In that case the trial court made a finding that there was no consent, still the Ninth Circuit reversed and this Court denied certiorari.

Despite a growing need for resolution of the problems presented by these cases, this Court in granting certiorari has continued to be obsessed and engrossed with nothing but "blue collar" crimes, to the exclusion of the problems raised here.

The best information we can obtain with respect to cases involving search and seizure, warrantless search and like problems shows that there are on the docket for the October Term 1970 the following cases:

Hill v. California, No. 51, Certiorari granted October 13, 1969, argued January 19, 1970, restored to calendar for reargument June 15, 1970, reargued Ocober 21, 1970.

Williams v. U.S., Docket No. 81, Certiorari granted March 23, 1970, argued October 21, 1970.

Elkanich v. U.S., Docket No. 82, Certiorari granted February 2, 1970, argued October 21, 1970.

Whitley v. Warden of Wyoming State Penitentiary, Docket No. 136, Certiorari granted April 27, 1970.

In addition the following cases are pending. Again, each is a blue collar case involving searches and seizures. Certiorari has been neither granted nor denied.

Koran v. Florida, Docket No. 50;
Teran v. California, Docket No. 86;
Wild v. U.S., Docket No. 104;
Porter v. Ashmore, Docket No. 110;
McGrew v. City of Jackson, Docket No. 116;
Hosey v. City of Jackson, Docket No. 134;
Turner v. U.S., Docket No. 228;
Tuck v. Oregon, Docket No. 411;
Mayfield v. Virginia; Docket No. 834;
Kelley v. U.S., Docket No. 880;
Jaskiewicz v. U.S., Docket No. 884.

These cases actually require nothing but a further review of prior decisions where the rules have been carefully stated. This is mere repetition.

In our case and in the case of *A. M. Lewis v. U.S.,* Docket No. 511, certiorari was denied. This area requires attention. It involves literally hundreds of thousands of regulatory agencies and millions of people all over the country. It involves regulations of all kinds from taxes to food and drug to weights and measures to health rules to building safety to building and other types of specifications, regulations concerning the grading and development of land and on into an almost limitless number of situations where the average man is accused of crime on some claim based upon an inspector's illegal intrusion. In spite of this the Court has rejected our petition for certiorari and instead is simply respading old ground in the search and seizure cases with respect to which it has granted certiorari.

II.

Substantial Grounds.

In preparing the petition for certiorari we sought to make it as brief as possible in accordance with the rules of this court. Among the grounds available to the petitioners and probably not adequately expressed in the petition is the fact that this matter should be resolved for the reason that it is not just a problem involving officers of companies or businessmen of substantial means. On the contrary, this problem extends right down to the most modest employee who may or may not be charged with some responsibility in connection with the maintenance of inventory or property. The white collar people involved are not usually the senior executives. They are ordinary people who suddenly find themselves charged with an offense which could not have been prevented. The offense is one which does not require intent. As we have indicated in the last paragraph, this includes literally hundreds of thousands of regulatory agencies of all kinds. Their demands for punishment are punitive in the extreme. They result in charging people who have prided themselves in all their dealings with honesty, integrity and respect for the law. Suddenly they find themselves entrapped in a situation which they could not have controlled if they tried, with respect to which there is no defense under the decisions, and suddenly the law becomes a cruel oppressive and unjust instrument of vengeance on the part of an administrative officer. They are then told by the Court of Appeals for Ninth Circuit that they have no rights because they are white collar workers. This Court then denies certiorari. True they may not make as much money or even have as large earnings as blue collar workers. They are not

people who are guilty of any kind of wrong doing or violence. They are simply made criminals by a *malum prohibitum* statute badly administered and worse inspected. Their conviction is based on a flagrant violation of their civil and constitutional rights. We say that these substantial grounds cry out to the court to consider and determine this matter. Make a determination that can be sufficiently definitive that it can be followed by all of the federal, state and local agencies and by the people who are employees of companies all over the country so that they may continue with their law abiding attitudes and their respect for the courts.

III.

Conclusion.

We pray the Court that it grant this Petition for Rehearing of the order denying certiorari, that it grant certiorari, and that the cause be determined on its merits.

Respectfully submitted,

WILLIAM J. CURRER, JR.,
Counsel for Petitioners, Thriftimart, Inc., Gilbert P. Stewart, William Todd, Sr., and Robert D. Jensen.

Certificate of Counsel.

I, WILLIAM J. CURRER, JR., do hereby certify:

1. I am a member of the bar of the Supreme Court of the United States and duly enrolled upon the roll of attorneys and counsellors of that Court.

2. I represent before this Court Thriftimart, Inc., Gilbert P. Stewart, William Todd, Sr., and Robert D. Jensen.

3. I have prepared the foregoing Petition for Rehearing and it is presented in good faith and not for delay.

4. The said petition is restricted to the grounds specified in Rule 58(2).

5. My manuscript signature has been manually signed by me on one of the forty copies of the said petition and this certificate filed with the clerk as required by Rule 58.

Dated: December 17, 1970.

WILLIAM J. CURRER, JR.,
Counsel for Thriftimart, Inc., Gilbert P. Stewart, William Todd, Sr., and Robert D. Jensen.